Supreme Court, U.S.
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No. 96-1179

In the
Supreme Court of the United States
October Term, 1996

Indicated Expansion Shippers,
Petitioner.

v.

Federal Energy Regulatory Commission,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENT PACIFIC GAS TRANSMISSION COMPANY IN OPPOSITION

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QUESTION PRESENTED

Where Congress has declared in § 1(c) of the Natural Gas Act that the rates charged by natural gas pipelines operated wholly within the State of consumption can be regulated by that State, was the Court of Appeals correct in concluding that those rates are beyond the purview of the Federal Energy Regulatory Commission's jurisdiction?

Rule 29.6 Listing

Respondent, Pacific Gas Transmission Company ("PGT"), is a wholly owned subsidiary of PG&E Gas Holdings, which is a wholly owned subsidiary of PG&E Corporation (a publicly traded corporation), and is a corporation organized and existing under the laws of the State of California. PGT's subsidiaries are all wholly-owned. Out of an abundance of caution, however, although not required by Rule 29.6, PGT hereby informs the Court that PG&E Corporation has entered into a merger agreement with Valero Energy Corporation, a publicly traded company. The merger has not been completed as of yet.

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OPINIONS BELOW

The opinion below of the Court of Appeals (Pet. App. 1- 17) is reported at 92 F.3d 1239. The orders of the Federal Energy Regulatory Commission ("FERC") (Pet. App. 19 - 303) are reported as described in the Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on August 23, 1996. A timely petition for rehearing was denied on October 24, 1996. The Petition was filed on January 22,

1997, and docketed on January 29, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

At bottom, the only issue presented for review is whether the rate structure set by the California Public Utilities Commission ("CPUC") for natural gas transportation solely within California and subject to the CPUC's exclusive jurisdiction was beyond the FERC's jurisdictional purview under the Natural Gas Act. The Court of Appeals correctly stated the facts and the course of the proceedings below relating to this issue, and Respondent hereby incorporates that discussion herein by reference.

ARGUMENT

1. The decision below by the Court of Appeals was entirely correct and sufficiently disposes of the arguments raised in the Petition.

2. The Petition presents no issues of general importance which merit review. There is also no conflict among the Circuits. The proceeding below affected only a few parties, and arose in a factual setting that is not likely to recur.

3. Petitioner's basic disagreement with the Court of Appeals is a factual one. It claims that a rate policy adopted by the CPUC (the so-called "crossover ban") denied access to existing transportation facilities. In fact, counsel for the FERC correctly represented to the Court of Appeals at oral argument that the issue is a rate issue, not an access issue. *See* Transcript

attached hereto as Appendix A. Thus, the Court of Appeals was correct in concluding (Pet. App. 13):

> Both PG&E's postage stamp rate and its crossover ban are, in effect, rate policies approved or required by the CPUC. The crossover ban is a bookkeeping, not an operating, convention; regardless how the gas flows through the existing and the expansion facilities, a new user is billed at the rate applicable to the new facilities while an existing user is billed at the rate applicable to existing facilities.

4. The second question presented by the Petition, namely, whether the Court of Appeals' interpretation of a provision of a federal statute (15 U.S.C. § 717(c)) violates the Supremacy Clause, is incomprehensible. If Petitioner is contending that enforcement of a federal statute delegating a matter to the States is violative of the Supremacy Clause, that contention is nonsensical.

5. Most significantly, the Petition (Pet. 7) is premised on the argument that the decision below is in conflict with another decision of the Court of Appeals, *United Distribution Companies v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996), *petitions for cert. filed*, 65 U.S.L.W. 3575-76 (U.S. Feb. 18, 1997) (Nos. 96-1186, 96-1187, 96-1188, 96-1189). There is no intra-Circuit conflict, and Petitioner's assertion to the contrary is misleading at best. Petitioner failed to advise the Court that the decision in *United Distribution Companies* was amended in relevant part, and any claimed intra-Circuit conflict has thereby

been eliminated. The Order amending the Court of Appeals' opinion in *United Distribution Companies* is attached hereto as Appendix B.

CONCLUSION

The Petition should be denied.

Respectfully submitted.

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Dated: February 28, 1997

APPENDICES

Appendix A

Excerpt from Transcript of

Oral Argument in *Altamont Gas Transmission v. FERC*,

92 F.3d 1239 (D.C. Cir. 1996) (argued Nov. 14, 1995).

Tr. 56:

THE COURT: One last one, at least for me. Is it common ground that this is purely a rate case? There's no question of physical access?

MR. ABENDROTH: Yes. All of California is open in that sense.

THE COURT: Thank you.

Appendix B

Order Amending

United Distribution Companies v.

***FERC,* 88 F.3d 1105 (D.C. Cir. 1996),**

dated Oct. 29, 1996.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 92-1485 **September Term, 1995**

United Distribution Companies,
Petitioner

v.

Federal Energy Regulatory Commission,
Respondent

---

and consolidated cases

Before: WALD, SENTELLE and ROGERS, *Circuit Judges.*

ORDER

It is **ORDERED**, by the Court, on its own motion, that the opinion filed herein on July 16, 1996, is amended, as follows:

At page 72:

Delete footnote 62

and substitute therefor new footnote 62, as follows:

The LDCs briefly argue that NGA § 1(c), the so-called "Hinshaw exemption," deprives the Commission of jurisdiction over their capacity sales to their own end-users. In this regard, they refer us to Congress' determination in §1(c) that certain pipelines are "matters primarily of local concern and subject to regulation by the several States." 15 U.S.C. §717(c). For the reasons set out in the text, however, the Commission's authority to regulate capacity release arises from its jurisdiction over the interstate pipeline that consummates the transaction and the subject of the transaction, the interstate transportation of gas, entirely independent of its jurisdiction over the releasing or replacement shipper. Accordingly, we reject the LDC's claim, given that they do not suggest that FERC has improperly exercised jurisdiction over the release of capacity held on nonjurisdictional Hinshaw pipelines.

Per Curiam
FOR THE COURT
Mark J. Langer, Clerk

BY: /s/ Lisa Nanches
Lisa Nanches
Deputy Clerk